In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1904

DIGILAB, INC. AND GUILLERMO FERLA, PETITIONERS

v.

SECRETARY OF LABOR AND LAWRENCE W. ROGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in remanding the case so that respondents could supply a more specific factual basis for their denial of petitioner's application for an alien labor certification under 8 U.S.C. 1182(a)(14).

1. Petitioner Guillermo Ferla is a native of Uruguay who entered this country as a student and now seeks to become a special immigrant under 8 U.S.C. 1101 (a)(27)(A) for the purpose of taking a job as an electrical engineer with Digilab, Inc., a corporation doing business in Massachusetts.

Before an alien in the position of petitioner Ferla may obtain special immigrant status for the purpose of employment, the Secretary of Labor must certify to the Secretary of State and the Attorney General, pursuant to 8 U.S.C. 1182(a)(14), that (A) there are not

sufficient workers in the United States who are able, willing, qualified, and available for the job which the alien has been offered, and (B) that the alien's employment will not adversely affect the wages and working conditions of similar workers in the United States.

The Secretary of Labor has delegated his power to issue labor certifications to the office of the Manpower Administration for the area wherein the employment is to occur. 29 C.F.R. 60.4(a). For aliens in the circumstances of petitioner, application must first be made to the State Employment Service, which evaluates the market for people qualified to fill the job in question; the State Employment Service forwards its report and information to the office of Manpower Adminstration. 29 C.F.R. 60.3(c). A certifying officer appointed by the Regional Manpower Administrator makes the inital determination based on the State Employment Service's report and other available information. 29 C.F.R. 60.4(a). Appeal from the certifying officer's determination lies to the Regional Manpower Administrator or a designated reviewing officer, whose determination is final. 29 C.F.R. 60.4(c).

Pursuant to these procedures, petitioners made application for labor certification to the Massachusetts Division of Employment Security on October 26, 1971, and on November 8, 1971, the Division advised that there were United States workers who were available for this position (Pet. 4). On November 15, 1971, the certifying officer of the Regional Manpower Administration denied labor certification and informed petitioners of its decision (Pet. App. A 17). The reason given for the decision was that United States' workers were available. On January 13, 1972, petitioners resubmitted their application to the Regional Manpower Administration,

presenting detailed facts and documentation in support of their application *(ibid.)*. On January 31, 1972, the reviewing officer upheld the decision of the certifying officer (Pet. App. A 18).

On April 7, 1972, petitioners filed a civil action against the Secretary of Labor and the Regional Manpower Administrator in the United States District Court for the District of Massachusetts seeking review of the decision of the Regional Manpower Administrator. The district court granted petitioners' motion for summary judgment and ordered that respondents issue the requested labor certification. In its opinoin (Pet. App. C 24), the district court held that 8 U.S.C. 1182(a)(14) required a determination by the Administrator that there are sufficient workers "able", "willing", "qualified", and "available" to Digilab, and that, because there was no such finding, there was insufficient evidence in the record to support the denial of certification.

Upon appeal by the Secretary of Labor, the First Circuit remanded the case to the district court for a direction to respondents for a more specific factual basis for their decision. The court stated its reasons as follows (Pet. App. A 21):

> The detailed enumeration of their job requirements and Ferla's qualifications to meet them (letter of January 13, 1972) are not adequately answered by the conclusory statement that some 200[1] electrical engineers are listed in a Registry maintained in Sacramento, California. "Electrical engineers" in this age

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[1]We have been informed that this statement was in error and should have read that in excess of 2,000 electrical engineers were listed in the Registry.

of intense specialization is far too generic a term in determining whether any of them are qualified in the particular field required by Digilab. This was the conclusion of the district judge in his first opinion, namely, that this fact "does not in this court's eyes establish a necessary record of sufficient workers in the United States who are 'qualified,' 'available,' 'able' and 'willing.' " Significance may also be attributed to the failure of the defendants, after learning of Digilab's specific requirements and Ferla's qualifications to meet them, to submit further proof of the availability of engineers in such a restricted category.

However, the Secretary's discretion in this field entrusted to him by Congress is not lightly to be disregarded. On the other hand, this discretion should not be exercised on the mere conclusory (possible irrelevant) statements given here.

2. The decision to remand was appropriate, and will best serve to permit the reconciliation of the twin legislative objectives which Congress sought to attain when it enacted 8 U.S.C. 1182(a)(14), *viz.*, (1) the admission into our country of skilled workers who would make a contribution to our society, and (2) the protection of our own workers who are available for employment in comparable jobs. This remand procedure has been generally followed, as petitioners concede (Pet. 11). *Secretary of Labor* v. *Farino*, 490 F. 2d 885, 891-892 (C.A. 7); *Guinto* v. *District Director of the United States Immigration and Naturalization Service*, 303 F. Supp. 1094 (C.D. Cal.), affirmed, 446 F. 2d 11 (C.A. 9); *Bitang* v. *Regional Manpower Administrator*, 351 F. Supp. 1342 (N.D. Ill.); *Ozbirman* v. *Regional*

Manpower Administrator, 335 F. Supp. 467, 472-473 (S.D. N.Y.).[2] It would have been inappropriate for the court of appeals to decide this case on the basis of the record before it, which it considered to be inadequate. Cf. *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 113-114.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[2]In *Golabek* v. *Regional Manpower Administration*, 329 F. Supp. 892 (E.D. Pa.), cited by petitioners (Pet. 11-12), there was no need to remand because the record was complete; the court merely held that the administrator had made an error of law in defining the job market in which to compare wage scales. 329 F. Supp. at 894-896. The instant case was remanded so that the respondents could enter their factual basis for denial for certification in the record, not because of an error of law.

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